IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
[2018] EWHC 768 (Admin)

CO/5878/2017

Royal Courts of Justice
Thursday, 22nd March 2018

Before:

THE HON. MR JUSTICE SUPPERSTONE

B E T W E E N :

THE QUEEN on the application of
AMANDA HILL — Claimant

- and -

DERBY CITY COUNCIL — Defendant

MISS T OSMUND-SMITH (instructed by Richard Buxton Environmental & Public Law) appeared on behalf of the Claimant.

MR H RICHARDS (instructed by Legal Services, Derby City Council) appeared on behalf of the Defendant.

DR A BOWES (instructed by Prospect Law) appeared on behalf of the Interested Party.

J U D G M E N T

MR JUSTICE SUPPERSTONE:

1 The claimant, a local resident and a member of the campaigning community organisation, "Oppose the Alfreton Road Incinerator", renews her application for permission to challenge the decision of the defendant council, made on 20th October 2017, to grant Envirofusion Ltd (the interested party) planning permission for the development of incineration facilities and erection of a chimney stack on land at Unit 7, North Edge Business Park, Alfreton Road, Derby, following refusal on the papers by Lang J.

2 There are three grounds of challenge. First, procedural unfairness in the failure to make the officer's report to the defendant's planning committee available in good time for inspection and comment, causing prejudice to objectors to the proposal and the public at large; second, that the committee were misled; and third, that the committee report failed to have regard to material considerations.

3 The first ground, that there was procedural unfairness, is advanced on the basis that the defendant informed objectors that the committee report would be available via a website link on which the report did not appear until 9th October. By the time the report was located there were only two clear days until the committee meeting and approximately five hours until the deadline for submission of documents to the meeting, with the result that those opposing the development were not able to take further advice on the content of it.

4 It is the claimant's case that the council's procedure was contrary to Regulation 7 of the Local Authorities (Executive Arrangements) (Meetings and Access to Information) (England) Regulations 2012, which required that the report was made available for inspection by the public at the offices of the defendant and on the defendant's website five clear days prior to the meeting. This ground, in my view, based on those regulations, is misconceived. Regulation 7 of the 2012 Regulations did not apply to this decision, which was not a decision of the Council's Executive.

5 Access to documents relating to a planning committee is governed by s.100B(3) of the Local Government Act 1972, which imposes an obligation to ensure a document is available for inspection five clear days before the meeting. There is no allegation that there was a breach of that obligation. Section 100B(3) does not require a planning committee report to be additionally available on a council's website.

6 Further, in my judgment, none of the matters referred to in the witness statement of Mrs Beck arguably caused prejudice to objectors or the public at large. Mrs Beck does not explain why, having not found the report where she was expecting it on 5th October, she waited until 9th October before raising the point with the council. I appreciate the weekend intervened but she could have asked for it on the Thursday or the Friday. In any event, she and others had a proper opportunity to participate in the process and there is no evidence of any matter that it is said would or could have been raised if they had had more time to prepare. Legal advice, of course, strictly only goes to legal matters.

7 It is said that the report of Dr Rollinson might have been drawn to the attention of the committee. However, the officer's report referred to the substance of Dr Rollinson's report and objectors were also referred to the report during the committee debate. This is a matter that I will return to in relation to Ground 3.

8 The second ground of challenge, namely that the committee were misled, alleges that Mr Paul Clarke, the defendant's head of development management, in presenting the application and responding to members' queries, materially misled the committee on various

matters. Those matters, in summary, were the lawful use of the site, the harm to the setting of heritage assets, the nature of the benefits of the development and the health and safety risks associated with the development.

9 As for the first, use of the site, the claimant contends that members were invited to grant permission in part on the basis that the proposals were of the same character as the existing uses, which, it is said, is not correct. Miss Osmund-Smith for the claimant says had members been aware that the application was for a *sui generis* use and not a general industrial use the decision might have been different. However, no change of use was sought as part of the application which sought planning permission for operational development only. The committee report, at para.7, makes clear that:

> "The proposed testing facility and what it encompasses is an extension to an existing industrial use to enable the company to test a new design of their product."

10 Further, I agree with Mr Bowes, for the interested party, that even if the operation of the building pursuant to the permission amounted to a change of use to a *sui generis* use, the full impact of the *sui generis* use would have been considered by the committee. The use is plainly an industrial use and in accordance with policy.

11 Next, as for the harm to setting of heritage assets, Miss Osmund-Smith submits that the advice of the officers in relation to heritage assets was inadequate. In particular, she submits the committee should have been informed that the harm identified was harm to the significance of the various assets through development in their setting. The presumption was against the grant of planning permission and that was not explained to the committee.

12 In my view, it is not arguable that members were not properly informed of the duties upon the council required by statute, the development plan and the MPPF, including para.132 of the framework which was set out in detail. I again agree with Mr Bowes that the officer's reference to "harm to setting" should be read in context. What the officer is there doing is drawing members' attention to the important duties required within the MPPF even if harm only arises by development within the setting of a heritage asset and that they need to be taken into account. That, in my view, is the reverse of minimising the significance of any harm to the significance of a heritage asset by development within its setting. What the officer was, in fact, doing was ensuring that it was taken into account.

13 The complaint in relation to benefits of development is without merit. The officer's report described the proposal as the "testing of a new technology" for a "temporary period of 18 months". The benefits of the proposal included the "greater understanding of energy generation and waste treatment technologies".

14 The complaint that members were misled as to health and safety risks associated with the development is the last point that is taken in this ground. It is said that there was significant confusion in respect of the interplay between the environmental permit and the planning permission. The position of the defendant is that the safe operation of the plant was for the permit. That was the submission of Mr Richards, for the defendant, supported by Mr Bowes. However, Miss Osmund-Smith contends the permit does not consider the risk of fire and explosion on the site and how that might be mitigated. It only sets out what is to be done in the event of an incident or accident. That, in my view, is not correct. The committee was plainly provided with documents dealing with the risk of fire and explosion. In my view, the answer to the point taken by Miss Osmund-Smith is summarised in the skeleton argument of Mr Bowes. What he says is this, that given the permit was already in

place at the point the planning permission was granted members were perfectly entitled to rely on that system of control operating effectively. I agree with that submission.

15 The council were provided with the relevant documentation. The risk of accidents was specifically identified within the risk assessment. The risk of fire or explosion was identified and assessed as a low residual risk. A plan was devised to manage that risk within the monitoring plan.

16 Reading the committee report as a whole, I consider it unarguable that Mr Clarke materially misled the members on a matter bearing upon their decision.

17 Turning finally to the third ground, again the focus of Miss Osmund-Smith is on health and safety. The way that she puts the submission is that those objecting to the scheme commissioned two external reports. One was a heritage impact assessment that was addressed on p.9 of the committee report and specifically referred to in the officer's consideration of the development. By contrast, the second, a report by Dr Rollinson, was not dealt with properly by the committee and none of the issues raised in that second report were addressed or responded to in the committee report. The failure to have regard to the expert evidence of Dr Rollinson amounted, she submits, to a failure to have regard to a material consideration. Miss Osmund-Smith contends that the three bullet points in the officer's report relating to Dr Rollinson, albeit unnamed, provide an inadequate summary of his report, in particular the safety concerns that he raised.

18 I again do not accept this submission. As for Dr Rollinson's report, as I have observed, his concerns were summarised, albeit briefly and without naming him, in the officer's report and it was made clear that the purpose – and this is the significant point – of the planning application was to be able to test the technology and systems over an eighteen month temporary period. As Mr Richards observes, the risk of fire and explosion during the testing of a new technology is plainly something that was considered and controlled by the permit. That being so, it would have been obvious that any benefits of the proposal were potential benefits only.

19 For the reasons I have given, none of the grounds of challenge are arguable. Accordingly, permission is refused.

MR JUSTICE SUPPERSTONE: Can I thank all counsel for their very helpful detailed submissions. Thank you very much. Now, is there any matter on costs that was raised?

MISS OSMUND-SMITH: Yes, my Lord, there is. So far as I'm aware, the council's costs are agreed.

MR RICHARDS: Yes. Mrs Justice Lang gave us £2,500 and I don't seek any more from this court and I understand that the claimant's happy to pay us.

MR JUSTICE SUPPERSTONE: Thank you very much. That sounds satisfactory. Yes.

MISS OSMUND-SMITH: The interested party, through the argument of Dr Bowes in his skeleton argument, do take some points, both about the costs cap that's applicable to my client in this case and also about his costs. And you'll have noted, my Lord, from----

DR BOWES: My Lord, if it assists, we don't take a point about the costs cap if permission were refused. I thought I'd made that point quite clear. If my Lord refused permission we accept the costs cap of £5,000 stays in place.

MR JUSTICE SUPPERSTONE: Yes.

DR BOWES: It was solely if it then proceeded that we were seeking that that be increased so I needn't – my learned friend needn't address----

MR JUSTICE SUPPERSTONE: So we don't need to worry about costs capping, no.

DR BOWES: -- you on the – on the Aarhus point.

MR JUSTICE SUPPERSTONE: Yes.

MISS OSMUND-SMITH: I'm very grateful for that----

MR JUSTICE SUPPERSTONE: Thank you very much.

MISS OSMUND-SMITH: -- indication. The skeleton argument did deal with those issues but----

MR JUSTICE SUPPERSTONE: Yes.

MISS OSMUND-SMITH: -- I don't have to address those now. So the point made, my Lord, is, if I can ask you, please, to turn up----

MR JUSTICE SUPPERSTONE: I'm – I'm not, I'm afraid, going to be able to deal with any detailed submissions with regard to costs. I think – I think Mr Buxton has produced an interesting case, hasn't he, in – is this the House of Lords decision that he wants me to – to refer to?

MISS OSMUND-SMITH: The simple point taken, my Lord, is that we resist the payment of the interested party's costs----

MR JUSTICE SUPPERSTONE: Yes.

MISS OSMUND-SMITH: -- of acknowledging service, and the reasons that we do are set out in the costs submissions dated 13th March, and Mr Bowes has – has addressed those. But essentially the point is this, that we ought only to be liable for one set of costs.

MR JUSTICE SUPPERSTONE: Yes. Can I just ask, how long is this going to take, this argument?

DR BOWES: Depending on what Miss Osmund-Smith says, I only have two points really to respond in addition to what's said in my skeleton argument so I anticipate dealing with it very quickly, my Lord.

MR JUSTICE SUPPERSTONE: Right. And you're content to deal with the *Barclay* decision? I think that's the one where Mr Buxton appeared----

DR BOWES: Yes.

MR JUSTICE SUPPERSTONE: -- before the House of Lords and has produced the----

DR BOWES: Yes.

MR JUSTICE SUPPERSTONE: -- what may be described as a draft judgment, I think it was, wasn't it?

DR BOWES: Yes, yes. The only one I think he, in fairness, said was available so I'm not taking a point on that.

MR JUSTICE SUPPERSTONE: Yes, no, no criticism whatsoever. Thank you for producing it.

DR BOWES: No, I'm grateful for that. Yes.

MR JUSTICE SUPPERSTONE: Yes. Very well.

MISS OSMUND-SMITH: I mean, simply I can put it in this way, my Lord, quite straightforwardly, that the ordinary principle that we should not be liable for two sets of costs applies. There is nothing in *Mount Cook* that disturbs that principle. Essentially, I have it at p.181 of the authorities bundle----

MR JUSTICE SUPPERSTONE: Yes, yes.

MISS OSMUND-SMITH: -- and it's para.76----

MR JUSTICE SUPPERSTONE: But two – two awards of costs are regularly made in planning cases where interested parties make – make a contribution to the – if I can put it this way, to the debate.

MISS OSMUND-SMITH: Yes. Well, as I understand it----

MR JUSTICE SUPPERSTONE: I mean, not in the – in the ordinary way the interested party wouldn't get its costs.

MISS OSMUND-SMITH: Yes. I mean, as I understand it, Dr Bowes isn't actually seeking his costs of the hearing today.

MR JUSTICE SUPPERSTONE: No, no, of course not.

DR BOWES: No.

MISS OSMUND-SMITH: It would be the acknowledgement of service.

MR JUSTICE SUPPERSTONE: No, we're only talking about the acknowledgement of service.

MISS OSMUND-SMITH: And on that issue I would say that Dr Bowes, having come in on this rather late and not having been responsible for drafting the acknowledgement of service and the grounds attached to it----

MR JUSTICE SUPPERSTONE: No, but that would be a question of quantum. We're dealing with the principle.

MISS OSMUND-SMITH: Yes, takes rather a different approach. The point made in the costs submissions submitted by Mr Buxton is essentially this that, yes, routinely they are provided but there is nothing in the rules that makes that----

MR JUSTICE SUPPERSTONE: Yes, but that's why I ask whether this was a point that can be determined within a minute or two because if you turn round and speak to Mr Buxton I think

he finds this an interesting point and I understand it, but he may want to have some consideration given to it. If not, we can just deal with it in the ordinary way. Do you want to have a word with him?

MISS OSMUND-SMITH: Thank you, my Lord. (After a pause)

MR JUSTICE SUPPERSTONE: Or we can deal with this interesting point on another day, in another case, but, anyway, if you want to deal with it in this case I haven't got time today to deal with any point of principle.

MISS OSMUND-SMITH: Well, might I respectfully suggest, my Lord, we deal with it in terms of – by written submissions?

MR JUSTICE SUPPERSTONE: In terms of?

MISS OSMUND-SMITH: By written submissions.

MR JUSTICE SUPPERSTONE: Yes, I think that's what Mr Buxton also suggested. Yes, happy with that. Are you content with that?

DR BOWES: Well, I think I'll have to be. Yes, I'm content with that.

MR JUSTICE SUPPERSTONE: Well, I think so. Do you want any further directions with regard to that or can you sensibly, as I'm sure you can, have a word between you, decide on the directions that you seek and include – include them in any draft order to me?

MISS OSMUND-SMITH: I'm sure, my Lord, yes, we can.

MR JUSTICE SUPPERSTONE: Well, thank you again. Thank you all very much.

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This transcript has been approved by the Judge.